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3 UNITED STATES DISTRICT COURT
4 DISTRICT OF NEVADA

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6 STATE OF NEVADA,

Case No. 3:18-cv-569-MMD-CBC

7 Plaintiff,

ORDER

8 v.

9 UNITED STATES; *et al.*,

10 Defendants.

11 The Court denied Plaintiff the State of Nevada's ("Nevada") motion for preliminary
12 injunction, which sought to enjoin any shipment of plutonium from the Savannah River Site
13 ("SRS") in South Carolina to the Nevada National Security Site ("NNSS") ("PI Motion").
14 (ECF No. 62.) Nevada has appealed that order as is its right. (ECF No. 65.) In addition,
15 Nevada has filed a motion for preliminary injunction pending its appeal ("PI Appeal
16 Motion"), asking the Court to enjoin "the DOE from shipping any plutonium to Nevada"
17 until its appeal is resolved. (ECF No. 69 at 3.) Because the Government¹ has affirmatively
18 represented that it does not plan to ship any plutonium from SRS to NNSS as part of the
19 challenged proposed action in the applicable supplemental analysis, the Court will deny
20 the PI Appeal Motion (ECF No. 69) as moot.

21 Nevada filed this lawsuit to challenge the Government's proposed action to
22 transport from SRS one metric ton of defense-grade plutonium for staging at NNSS and/or
23 the Pantex Plant in Carson County, Texas ("Pantex") before shipment to Los Alamos

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25 ¹Here, Nevada sues the Department of Energy ("DOE"), the United States
26 Secretary of Energy, Rick Perry, in his official capacity, and the National Nuclear Security
27 Administration ("NNSA") and its administrator, Undersecretary for Nuclear Security, Lisa
28 E. Gordon, in her official capacity. (ECF No. 1 at 4.) These Defendants are collectively
referred to as "the Government."

1 National Laboratory ("LANL") in Los Alamos, New Mexico ("Proposed Action")² without a
2 supplemental environmental impact statement ("EIS"). (ECF No. 1; ECF No. 27-3
3 (DOE/NNSA's Supplement Analysis) at 9, 23.) The Government evaluated safety and
4 security issues relating to the Proposed Action in a DOE/NNSA Supplemental Analysis
5 ("SA"), which relied upon prior EISs concerning these matters. (See ECF No. 62
6 (discussing the SA).) The crux of Nevada's claim is that the prior EISs and thus *the SA*
7 are inadequate for evaluating the current risks to Nevada and the Government needs to
8 perform a supplemental EIS to comply with the National Environmental Protection Act of
9 1969 ("NEPA"), 42 U.S.C. 432 *et seq.* and other applicable regulations. (ECF No. 1 at 5,
10 9, 14–15; ECF No. 34 at 12–13.) The Complaint particularly asserts claims for: (1) violation
11 of NEPA; (2) violation of implementing regulations of the Council of Environmental Quality,
12 40 CFR § 1502.9(c)(1); and (3) violation of DOE's NEPA regulations, 10 CFR §
13 1021.314(a). (ECF No. 1 at 4, 17–18.)

14 In the PI Motion Nevada sought to enjoin any shipment of plutonium from the SRS
15 to NNSS until its claims are decided on the merits. (ECF Nos. 2, 62.) However, on January
16 30, 2019, after completion of briefing on the PI Motion, the Government submitted a Notice
17 of New Information ("Notice") with a sworn declaration providing that shipment of one-half
18 metric ton of plutonium to Nevada under the Proposed Action had been completed prior
19 to November 2018—the month in which Nevada filed this lawsuit. (ECF Nos. 56, 56-1.) In
20 response to the Court's minute order for status report, the Government affirmed that no
21 more plutonium will be shipped to NNSS as part of the SA's Proposed Action. (ECF No.
22 58 at 2.) The Government informed that all other shipments of plutonium under the SA's
23 Proposed Action "are going elsewhere." (*Id.*) The Government has reaffirmed this
24 information per declaration of Bruce M. Diamond, General Counsel for the NNSA, in
25 response to the PI Appeal Motion. (ECF No. 74-1.)

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1 Considering these facts, the Court finds the relief requested in the PI Appeal Motion
2 is moot. Here, Nevada specifically seeks to enjoin pending appeal *any further* shipments
3 of plutonium contemplated in the very SA which the Government has affirmed will no
4 longer serve as the basis for any further shipments. To be clear, this lawsuit is limited to
5 challenging the Proposed Action set forth in the SA, and therefore concerns no other
6 alleged ongoing or potential transport of plutonium in and out of Nevada.³ The Court
7 therefore disagrees with Nevada that the action cannot be moot. (ECF No. 76 at 3.)

8 The Court specifically finds contrary to Nevada's contention that the Government's
9 attestation is tantamount to voluntary cessation of wrongdoing and is therefore unlikely to
10 moot the need for injunction. (*Id.*) The essence of "voluntary cessation" is that a
11 defendant's alleged wrongful conduct is *not necessarily moot* if the challenged conduct—
12 though ceased—*could recur*. See, e.g., *Knox v. Service Emps. Intern, Local 1000*, 567
13 U.S. 298, 307 (2012) (internal citation omitted) ("The voluntary cessation of challenged
14 conduct does not ordinarily render a case moot because a dismissal for mootness would
15 permit a resumption of the challenged conduct as soon as the case is dismissed. And
16 here, since the union continues to defend the legality of the Political Fight-Back fee, it is
17 not clear why the union would necessarily refrain from collecting similar fees in the
18 future."); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 170
19 (2000) (citing *United States v. Concentrated Phosphate Export Assn.*, 393 U.S. 199, 203
20 (1968)) ("A case might become moot if subsequent events make it absolutely clear that

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22 ³At points in the PI Appeal Motion, Nevada uses broad language that could
23 suggests that Nevada seeks a broad injunction to prevent the Government from generally
24 shipping any more plutonium to the state. See, e.g., ECF No. 69 at 3 ("Nevada therefore
25 requests that the Court issue an injunction pending appeal, enjoining the DOE from
26 shipping any plutonium to Nevada while the State's preliminary injunction appeal is
27 pending."); *id.* at 5 ("No more plutonium should pass through Nevada's largest city until
28 [Nevada's] appeal is decided."). However, Nevada confirmed in its reply that the
preliminary injunction it presently seeks is limited to further shipments of plutonium
contemplated *by the SA*. (ECF No. 76 at 6.) Further, the Court recognizes that the
likelihood that the Government could ship plutonium to Nevada under some other plan—
not the SA—is of no import here. Nor would this Court have authority to consider a broader
preliminary injunction beyond the claims asserted in the Complaint pertaining only to the
SA.

1 the allegedly wrongful behavior could not reasonably be expected to recur. The heavy
2 burden of persuading the court that the challenged conduct cannot reasonably be
3 expected to recur lies with the party asserting mootness.”). Nevada’s voluntary cessation
4 argument is inapplicable here for multiple reasons.

5 First, in addition to the Government informing that no further shipments to Nevada
6 will be made under the SA, the narrow “wrongful” act of which Nevada is chiefly
7 concerned—shipment of plutonium to NNSS under the SA—has already occurred. As a
8 practical matter, the plutonium that is already at NNSS would need to be returned from
9 whence it came for the wrongful act to “recur.” And even then, that the Government has
10 already shipped plutonium to Nevada under the SA cannot be undone—thus supporting a
11 conclusion that the PI Appeal Motion is moot. See, e.g., *Friends of The Earth, Inc. v.*
12 *Bergland* (“*Bergland*”), 576 F.2d 1377, 1379 (9th Cir. 1978) (“Where the activities sought
13 to be enjoined have already occurred, and the appellate courts cannot undo what has
14 already been done, the action is moot.”).

15 Further, the Court is persuaded that no further shipments to NNSS under the
16 Proposed Plan can reasonably be expected to occur considering the key drivers of this
17 case—an order issued by the U.S. District Court for the District of South Carolina
18 (“Order”)⁴ and the SA. This is because the Government clarifies that as to Nevada, the SA
19 has run its course. Provided with the Government’s affirmation, the Court has no non-
20 speculative ground upon which to conclude that further shipments to Nevada will be made
21 pursuant to the SA.

22 Notably, the Government has also declared that any other shipments under the SA
23 will go elsewhere. (ECF No. 74-1.) This is a course fully planned for in the SA, as called
24 for by the Order. Compliance with the Order requires only that the Government moves
25 “not less than one metric ton” of the plutonium from SRS “elsewhere.” *United States*, 2017
26 WL 7691885, at *5. The fact that one-half metric ton has already been transported to

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28 ⁴*South Carolina v. United States*, No.: 1:16-cv-00391-JMC, 2017 WL 7691885 (D.
S.C. Dec. 20, 2017).

1 Nevada supports—not undermines—the Government’s declaration that the remainder will
2 go elsewhere. Relevantly, the NNSS was only one of the possible locations the SA
3 contemplated for receiving shipments of the plutonium from SRS—as indicated, Pantex is
4 another. (ECF No. 27-3 at 9.) For these same reasons, the exception to mootness—that
5 the specific wrongful act is “capable of repetition yet evading review” is inapplicable here.
6 See e.g., *Bergland*, 576 F.2d at 1379 (citation omitted) (discussing the exception). Within
7 reason and based on the Government’s representation, there is unlikely to be further
8 shipments of plutonium to NNSS under the SA. Accordingly, the Court finds that there is
9 no further action—shipment of plutonium to NNSS under the SA—for the Court to
10 preliminarily enjoin and therefore denies the PI Appeal Motion as moot.

11 It is therefore ordered that Nevada’s motion for preliminary injunction pending
12 appeal (ECF No. 69) is denied as moot because there is no relevant impending concrete
13 action, under the SA, by the Government for this Court to enjoin.

14 It is further ordered that Nevada’s motion for a status conference (ECF No. 61) is
15 denied as moot in light of the appeal (ECF No. 65).

16 It is further ordered that because Intervenor Defendant South Carolina’s motion to
17 transfer venue (ECF No. 37) is inextricably related to the matter that is now on appeal, this
18 Court lacks jurisdiction to decide that motion⁵ and therefore denies it as moot without
19 prejudice.

20 It is further ordered that Attorney Robert D. Cook’s motion to withdraw as attorney
21 for South Carolina (ECF No. 68) is granted.

22 DATED THIS 25th day of February 2019.

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25 MIRANDA M. DU
UNITED STATES DISTRICT JUDGE

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27 ⁵There is a general rule that an appeal suspends the power of the court below to
28 proceed further in a case, except to take such steps as will assist the appellate court in its
determination. *Hovey v. McDonald*, 109 U.S. 150, 157 (1883); see *Stein v. Wood*, 127
F.3d 1187, 1189 (9th Cir. 1997) (“[T]he filing of a notice of appeal divests a district court
of jurisdiction over those aspects of the case involved in the appeal.”).